Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

UNIDENTIFIED PRIVATE CITIZEN,
Petitioner,

vs.

McCLATCHY NEWSPAPERS, INC.
dba *THE SACRAMENTO BEE,*
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May an individual's interest in reputation and privacy justify redacting his identity from court documents and defeat a First Amendment claim of access?

PARTIES TO THE PROCEEDING

Petitioner is an Unidentified Private Citizen.[1] Petitioner was a Real Party in Interest in the proceedings below. Other Real Parties in Interest were an Unnamed Public Official, the United States of America and defendant Mark Leslie Nathanson.

The respondent is McClatchy Newspapers, Inc., dba *The Sacramento Bee*.

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[1] To preserve the confidentiality of Petitioner's identity during the pendency of these proceedings, both the District Court and the Court of Appeals permitted Petitioner to appear as an Unidentified Private Citizen and Petitioner's counsel as Doe Counsel. Filed concurrently with this petition is a motion for leave of this Court to permit Petitioner to continue to refer to himself as an Unidentified Private Citizen and his counsel as Attorney Doe.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Unidentified Private Citizen respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit dated April 17, 2002. The Court of Appeals granted a petition for writ of mandamus sought by McClatchy Newspapers, Inc., dba *The Sacramento Bee*. The Court of Appeals denied the Unidentified Private Citizen's petition for rehearing and petition for rehearing *en banc*.

OPINIONS AND ORDERS BELOW

The April 17, 2002 amended opinion and order denying the petition for rehearing and petition for rehearing *en banc* of the United States Court of Appeals appears at Appendix A to the petition and is reported at 288 F.3d 369 (9th Cir. 2002). The December 3, 2001 original opinion, which was withdrawn from publication, appears at Appendix B.

The April 20, 2001 unreported opinion of the United States District Court appears at Appendix C.

The January 22, 2001 unreported opinion of the United States Court of Appeals appears at Appendix D.

JURISDICTION OF THIS COURT

The petition for a writ of certiorari seeks review of the April 17, 2002 decision of the United States Court of Appeals for the Ninth Circuit which granted a petition for writ of mandamus filed by McClatchy Newspapers, Inc. dba *The Sacramento Bee* and ordered the District Court to make publicly available certain unredacted proffer letters previously released with redactions by the District Court. Petitioner timely filed a petition for panel rehearing and for rehearing *en banc* which was denied.

Jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech . . ."

STATEMENT OF THE CASE

In June 1993, Mark Nathanson ("Nathanson") pleaded guilty in the United States District Court for the Eastern District of California to one count each of racketeering and filing a false income tax return. In August 1993, the District Court sentenced Nathanson to a 57-month term of imprisonment.

In August 1994, Nathanson filed under seal a motion to reduce his sentence pursuant to Federal Rule of Criminal Procedure 35(b). Nathanson filed the motion under seal

because the moving papers included two "proffer letters" dated May 31, 1993 and August 11, 1994 that Nathanson's counsel previously had submitted to the government as law enforcement investigative materials. The proffer letters describe various types of alleged criminal activity and misconduct by multiple individuals, including the Unidentified Private Citizen ("Private Citizen") and a high-level public official. The government determined, however, that there was no basis to investigate Nathanson's allegations because Nathanson was "unreliable" and had been "untruthful" during prior interviews.

Nathanson's proffer letters remained under seal until petitioner McClatchy Newspapers, Inc. dba *The Sacramento Bee* ("*The Bee*") requested access to them in October 1999. At a December 7, 1999 hearing, the District Court unsealed the proffer letters after redacting them to conceal the identities of the named individuals.

The Bee petitioned for a writ of mandamus. In a memorandum opinion filed on January 22, 2001, the Court of Appeals granted *The Bee*'s petition and remanded to the District Court "to make factual findings in consideration of whether privacy interests alone justify the redactions." Appendix D.

On remand, the District Court invited briefing from the interested parties named in the proffer letters. The Unidentified Private Citizen submitted both a brief and evidence to the District Court demonstrating that his reputation and privacy constitute a compelling interest justifying redaction of the proffer letters' identifying references to him. Following oral argument, the District Court issued a written order on April 20, 2001. Appendix C. In the April 20 order, the District Court made specific factual findings as to,

inter alia, the Private Citizen's compelling interest in reputation and privacy and the lack of newsworthiness of the proffer letters. The District Court concluded that "retaining the redacted form of the proffer letters serves the compelling interest of protecting both the privacy interests and the reputational interests of ... the private individual." The District Court also found that "in the absence of redaction, the compelling interest in privacy and reputation would be harmed" and that the redactions were "narrowly tailored to ensure privacy without unduly restricting the public access to the Nathanson Rule 35 materials." Based on these and other findings of fact and conclusions of law, the District Court denied *The Bee*'s motion for access to the unredacted proffer letters.

The Bee again petitioned the Court of Appeals for a writ of mandamus. The Court of Appeals granted the petition in an opinion filed on December 3, 2001 and ordered the District Court to release the unredacted proffer letters. Appendix B. Following the Private Citizen's timely petition for rehearing and suggestion for rehearing *en banc*, the Court of Appeals withdrew its initial opinion. On April 17, 2002, the Court of Appeals issued an amended opinion granting *The Bee*'s petition and denying the Private Citizen's petition for rehearing and for rehearing *en banc*. Appendix A.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT AN INDIVIDUAL'S INTEREST IN REPUTATION CANNOT JUSTIFY REDACTIONS TO COURT DOCUMENTS IS INCONSISTENT WITH THIS COURT'S TEACHINGS AND THE LAW OF THE THIRD CIRCUIT

The issue presented here is whether an individual's interest in reputation may ever overcome a First Amendment claim of access to court files. This case pits the Private Citizen's interest in having non-credible and uncharged criminal allegations against him contained in the District Court's files remain under seal against a newspaper's efforts to obtain the unredacted documents that contain those allegations.

The Court of Appeals held that an interest in reputation cannot justify redactions to court files. In so holding, the Court of Appeals did not even consider the District Court's careful factual findings, based on the evidence before it, that there is a substantial probability that disclosure of the proffer letters' allegations would cause significant harm to the Private Citizen's reputation and impair his business and the livelihoods of his partners and employees. Nor did the Court of Appeals consider whether the District Court's limited redactions to the proffer letters were narrowly tailored to protect the Private Citizen's reputational interest while providing *The Bee* with access to the remainder of the proffer letters.

The bright-line rule employed by the Court of Appeals – that an interest in reputation cannot, as a matter of law, defeat a claim of access to court files – is inconsistent with this Court's teachings that privacy interests may defeat a claim for access to court records and that courts must evaluate whether

an asserted privacy interest justifies closure on a fact-specific, case-by-case basis. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

The Court of Appeals' ruling in this case also directly conflicts with the well-established law of the Third Circuit, which has long held that an individual's interest in reputation may, under appropriate circumstances, defeat a claim of access to court documents. *See, e.g., United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985).[2] The Third Circuit's decisions on this issue, including *Smith*, are more faithful to this Court's teachings. Under the Third Circuit's approach, a court evaluates an asserted interest in reputation and privacy on a case-by-case basis to determine whether the interest justifies total or partial closure of court records. This approach recognizes that not all asserted interests in reputation are equal and allows the district courts to perform their traditional role of fact-finder and make an individualized evaluation of each claim on its factual merits.

The Private Citizen respectfully submits that review by this Court is necessary to resolve the inter-circuit split created by the Court of Appeals' decision in this matter and to correct the Court of Appeals' erroneous application of the well-settled principles established by this Court for evaluating closure of court documents. Moreover, the issue presented here involves the scope of a newspaper's First Amendment right of access and presents a question of pressing importance for the lower courts' management of their files and the news media's access thereto.

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[2] The Court of Appeals' opinion does not even mention the Third Circuit's decision in *Smith*, despite the fact that the parties extensively cited and relied upon that case in their briefs and at oral argument.

A. This Court has recognized that an interest in privacy may defeat a claim of access to judicial proceedings and files

This Court has recognized that individual privacy rights may, under appropriate circumstances, defeat a request for access to judicial proceedings. In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court considered the constitutionality of a state statute that required closure of sex-offense trials during the testimony of minor victims. Although the Court concluded that the statute's mandatory closure requirement did not pass constitutional muster, the Court found that "the protection of minor victims of sex crimes from further trauma and embarrassment" could constitute a compelling interest justifying closure. *Id.* at 607.

The Court further explained that, in evaluating an asserted privacy interest, courts must employ a case-specific approach, as "it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("*Press I*"), likewise supports a case-by-case analysis. There, the trial court denied the press access to the *voir dire* of individual jurors in a criminal case on the grounds that, *inter alia*, closure would protect "the right to privacy of the prospective jurors." *Id.* at 510. This Court held that the trial court erred by failing to make factual findings in support of the closure order or considering alternatives to closure. Significantly, the Court noted that a juror's right to privacy could justify closure if supported by adequate factual findings:

> The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain . . . The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

Id. at 511-512.

B. The Third Circuit Recognizes That An Interest In Reputation Falls Within The Penumbra Of Privacy Interests That May Justify Closure Of Court Documents

Consistent with this Court's teaching that whether an asserted privacy interest justifies closure requires a case-by-case determination, the Third Circuit has held that, under appropriate circumstances, an interest in reputation and privacy justifies closure of court proceedings and sealing of court records. *See, e.g., United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (district court properly denied newspapers access to bill of particulars identifying possible co-conspirators in criminal case where publication would likely inflict serious injury on the reputations of the identified persons); *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 94 (3d Cir. 1991) ("This Court has noted that an individual's privacy or reputational interests may, in some circumstances, rise to the level of a compelling governmental interest and defeat a media organization's constitutional right of access . . . ."); *United States v. Criden*, 648 F.2d 814, 829 (3d Cir. 1982) (district court's conclusion that disclosure of information would inflict

"unnecessary and intensified pain on third parties" permits denial of motion for disclosure based on common law right of access).

Smith is particularly instructive. There, the defendants faced federal criminal charges in connection with an alleged scheme to obtain government contracts by bribing public officials. Two defendants each filed a motion for a bill of particulars requesting that the government identify the unindicted co-conspirators referred to in the indictment, as well as those persons who could conceivably be considered unindicted co-conspirators. The district court granted the motion but ordered that the names be kept under seal. News organizations appealed the district court's order sealing the list of names.

The Third Circuit affirmed. Even though the news organizations had a presumed right of access to the bill of particulars, the Court of Appeals concluded that the "reputational and privacy interests of the named individuals" constituted a compelling interest justifying the district court's decision to seal the list of names:

> If published, the sealed list will communicate to the general public that the named individuals, in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust. This broad brush assertion will be unaccompanied by any facts providing a context for evaluating the basis for the United States Attorney's opinion with respect to any given individual. When one adds to this that the United States

> Attorney's opinion was formed on the basis of an investigation that had not yet reached the point where he was willing to make a decision on whether to prosecute, it becomes apparent that the risk of serious injury to innocent third parties is a grave one. Finally, as the trial judge noted, *the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence in a trial. This means that the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable.*
>
> The individuals on the sealed list are faced with more than mere embarrassment. It is no exaggeration to suggest that publication of the list might be career ending for some. *Clearly, it will inflict serious injury on the reputations of all.* In some instances, there may be truth to the prosecutor's accusation. On the other hand, given the stage at which his opinion was formed and his "conceivably may have" standard, *it is virtually certain that serious injury will be inflicted upon innocent individuals as well. In these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.*

Id. at 1113-1114 (emphasis added).

C. The Court of Appeals' Decision In This Case Directly Conflicts With The Law Of The Third Circuit

In this case, the Court of Appeals recognized that privacy interests may justify closure of court files, but attempted to draw a distinction between the Private Citizen's interest in privacy and his interest in reputation in relation to the accusations against him contained in the proffer letters. As to privacy, the panel concluded, without citing any authority, that "[t]he private individual, who was found by the district court to do much business with public bodies, has no privacy interest in allegations, baseless though they may be, bearing on the way he does business with public bodies." Appendix A, p. A-9. As to the Private Citizen's interest in reputation, the Court of Appeals held:

> Who could or would deny that reputation is a valuable asset? Who could or would dispute the district court's observation that a charge of corruption against a public official is difficult to dispel by denial? But injury to official reputation is an insufficient reason "for repressing speech that otherwise would be free." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978).

Appendix A, p. A-10.[3]

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[3] In *Smith*, the Third Circuit also rejected the argument, apparently adopted by the Court of Appeals in this case, that an interest in reputation cannot be worthy of protection where the reputation at stake is that of a public official or employee. *Smith*, 776 F.2d at 1114. Indeed, the Private Citizen is not a public official

Because the Court of Appeals held that, as a matter of law, the Private Citizen's interest in reputation could not justify the District Court's redactions of the Nathanson proffer letters, the Court of Appeals did not weigh the District Court's factual findings as to the substantial probability that the Private Citizen will suffer reputational damage if the proffer letters are released in unredacted form. Nor did the Court of Appeals consider whether the District Court's redactions were narrowly tailored to protect the Private Citizen's interest in reputation and privacy without unduly limiting *The Bee*'s access to the remainder of the proffer letters.

The Court of Appeals' holding that the Private Citizen's interest in reputation cannot overcome *The Bee*'s qualified right of access to the court files is plainly inconsistent with the law of the Third Circuit, which recognizes that "an individual's privacy or reputational interests may, in some circumstances, rise to the level of a compelling governmental interest and defeat a media organization's constitutional right of access . . . ." *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 94 (3d Cir. 1991); *see also Smith, supra.*

Moreover, the Court of Appeals' reliance on isolated dicta from *Landmark Communications* is misplaced, for that case dealt with the criminal prosecution of a newspaper publisher for publication of lawfully obtained information already in its possession. The issue here, however, is not *The Bee*'s right to publish what it already possesses, but its ability to obtain the unredacted proffer letters in the first instance. *Cf. Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 17-18 (1986)

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or employee but, like many businesspersons, merely obtains permits from governmental bodies for his business projects.

(Stevens, J., dissenting) ("[T]he First Amendment right asserted by petitioner is not a right to publish or otherwise communicate information lawfully or unlawfully obtained ... but the right to acquire access thereto.").

Finally, the Court of Appeals' failure to even consider the District Court's factual findings as to reputational injury is plainly inconsistent with this Court's teachings that requests for closure must be evaluated on a fact-specific, case-by-case basis. *See, e.g., Globe Newspaper Co., supra.*

II. CONCLUSION

"[T]he sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). The Court of Appeals' categorical rejection of the Private Citizen's interest in reputation and privacy as grounds for redacting the proffer letters cannot be squared with this principle, including this Court's teachings the evaluation of asserted privacy interests as a basis for closure requires a case-by-case approach. Nor can the Court of Appeals' ruling be reconciled with the law of the Third Circuit.

The Third Circuit's case-specific approach, as reflected in *Smith, supra*, is consistent with this Court's precedents and represents the correct approach to dealing with an asserted interest in privacy and reputation as justification for closing or redacting court files. Indeed, in the great majority of such cases, the district courts will likely conclude that the asserted interest in privacy and reputation does not justify closure. But the district courts should have the discretion to make such a

decision on a case-by-case basis, something that the Court of Appeals' categorical ruling in this case precludes.

Given the importance of this constitutional issue, and the conflict between the Court of Appeals' decision and the law of the Third Circuit, the Private Citizen respectfully requests that this Court grant the petition for a writ of certiorari.

DATED: July 14, 2002

Respectfully Submitted,

Attorney Doe

Counsel for Petitioner
Unidentified Private Citizen

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: MCCLATCHY NEWSPAPERS, INC., dba The Sacramento Bee. MCCLATCHY NEWSPAPERS, INC., dba The Sacramento Bee, *Petitioner,* v. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Respondent,* MARK LESLIE NATHANSON; UNITED STATES OF AMERICA; AN UNNAMED PUBLIC OFFICIAL; AN UNIDENTIFIED PRIVATE CITIZEN, *Real Parties in Interest.*	No. 01-70941 D.C. No. CR-92-00215-LKK
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MCCLATCHY NEWSPAPERS, INC., dba The Sacramento Bee, *Defendant-Appellee,* v. MARK LESLIE NATHANSON, *Appellant.*	No. 01-10335 D.C. No. CR-92-00215-LKK ORDER AND AMENDED OPINION

Petition for a Writ of Mandamus

Argued and Submitted
November 13, 2001—San Francisco, California

Filed December 3, 2001
Amended April 17, 2002

Before: Mary M. Schroeder, Chief Judge, John T. Noonan, and William A. Fletcher, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

Rex Heinke, Beverly Hills, California, for petitioner McClatchy Newspapers, Inc.

James C. Harrison, Esq., San Leandro, California, for the Unnamed Government Official.

Doe Counsel, for the Unidentified Private Citizen.

ORDER

The opinion filed on December 3, 2001 is amended as follows:

At slip op. p.16333, after new ¶3 and before ¶4, add the following:

> The right "to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files have become a vehicle for improper purposes." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1972). Courts have properly refused "to permit their files to serve as reservoirs of libelous statements for press consumption"

> or "as sources of business information that might harm a litigant's competitive standing." *Id.* at 598. But this case does not involve "the protection of minor victims of sex crimes from further trauma and embarrassment." *See Globe Newspaper v. Superior Court*, 457 U.S. 596, 607 (1982); nor is there present the governmental interest in protecting the privacy of jurors. *See Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984); nor is there the governmental interest in preventing abuse of the civil discovery process. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35-36 (1984); nor is there the governmental interest in not tipping off suspects by disclosure of search warrants. *Times-Mirror Company v. United States*, 873 F.3d 1210, 1215-16 (9th Cir. 1989). These cases do show that the need to protect individual privacy rights may, in some circumstances, rise to the level of a substantial governmental interest and defeat First Amendment right of access claims. No such interest has been established here. The Supreme Court has noted that the American view of the right to inspect and copy court documents is in contrast with English practice and embraces as an interest compelling disclosure "the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper publisher's intention to publish information concerning the operation of government." *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598.

With these amendments, the panel voted to deny the petition for rehearing. Judges Schroeder and Fletcher have voted to deny the petition for rehearing en banc and Judge Noonan recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the petition for rehearing en banc is DENIED.

OPINION

NOONAN, Circuit Judge:

McClatchy Newspapers, Inc., dba *The Sacramento Bee* (*The Bee*), seeks a writ of mandamus to reverse the final post-judgment order of the district court in response to *The Bee*'s request that it unseal, without redaction, two proffer letters offered by Mark Leslie Nathanson (Nathanson) in connection with his motion to reduce his criminal sentence. We grant the writ, vacate the order, and remand to the district court to unseal the letters and make them publicly available without redaction.

FACTS AND PROCEEDINGS

On May 7, 1992, Nathanson was indicted on eight felony counts arising from federal offenses committed in his service from 1986 to 1992 as a member of the California Coastal Commission. On June 23, 1992, jury trial before Judge Lawrence K. Karlton was set for February 10, 1993, a date that was postponed. On June 3, 1993, Nathanson entered into a plea agreement. On June 24, 1993, he pleaded guilty to conducting his position as a Coastal Commissioner "as a racketeering enterprise," seeking bribes from fourteen persons dealing with the Coastal Commission in amounts ranging from $25,000 to $250,000. He also pleaded guilty to filing a false tax return in 1991, concealing one of the bribes he had received. The bribes were paid by identified real estate developers and by persons owning homes on the coast. The $250,000 bribe was arranged with the help of Alan Robbins, a state senator later convicted of other federal crimes. On August 24, 1993, Nathanson was sentenced to imprisonment for 4 years and 9 months.

The plea agreement, paragraph 20, provided that if the government decided that Nathanson's cooperation warranted it, the government would, within one year of the imposition of sentence, move under Rule 35 of the Federal Rules of Criminal Procedure to reduce Nathanson's sentence. The government did not make such a motion, but one year to the day from his sentencing, Nathanson filed a motion to reduce his sentence, attaching to the motion two letters (the Proffer Letters) which he said pointed to information of value to the government. The first letter was from Nathanson's lawyer, Stephen L. Braga, to Assistant U.S. Attorney Geoffrey Goodman and was dated May 31, 1993, that is, shortly before Nathanson and the government agreed to his plea of guilty. The letter recounted a number of times in which a high political figure approached Nathanson to get Nathanson's assistance in obtaining campaign contributions from people who had received favorable action by the Coastal Commission. The second letter, dated August 11, 1994, was from Jerrold M. Ladar, another lawyer for Nathanson, to Assistant U.S. Attorney John K. Vincent. In this letter the same political figure was alleged by Nathanson to have sought favorable action from the Coastal Commission on behalf of friends and supporters. Nathanson also was reported to have agreed to a bribe, disguised as a consulting fee, to be paid by a developer seeking his support in action by the Coastal Commission.

No action was taken on Nathanson's motion to reduce sentence, a motion that did not quality as a Rule 35 motion because it was not made by the government. Nathanson's motion was not docketed, and it, together with the Proffer Letters, was placed in the clerk's safe, beyond public scrutiny.

Two years later, on August 27, 1996, Assistant U.S. Attorney John K. Vincent moved, pursuant to Fed. R. Crim. P. 35, to reduce Nathanson's prison sentence from 4 years, 9 months to 3 years, 9 months. The motion stated it was made "in light of assistance he had provided to the government, as well as humanitarian concerns about his skin condition." This motion

qualified, in part, as a Rule 35 motion because it was made by the government. It did not, however, specify assistance to the government in a criminal case, as required by Rule 35. No hearing was held. On September 29, 1996, Judge Karlton granted the motion.

On September 14, 1999, Nathanson's probation officer filed a petition to revoke his probation for failure to pay restitution. *The Bee* learned of this proceeding and, on October 14, 1999, requested access to three documents numbered 175, 176, and 177 which were not in the file or referred to in the docket. *The Bee* noted that neither the Rule 35 motion nor court's order contained information "about the basis for the substantial reduction" of Nathanson's sentence. On November 9, 1999, the court held a hearing on *The Bee*'s request. The government now moved formally to seal the documents sought by *The Bee*. The court sealed the documents. On December 7, 1999, the court released the Proffer Letters in redacted form. The district court's reasons for its redactions were "the safety of the defendant, his well-being. And also the reputation of other people that the government has concluded there is no evidence to suggest were guilty of crimes but were nevertheless accused of crimes."

The Bee sought a writ of mandamus to obtain the unredacted letters. On January 22, 2001, we granted the writ, observing that the government conceded that it was "unable to identify specific facts that Nathanson's safety would be in greater jeopardy," and noting that the district court had not identified "any facts whatsoever" to support its redactions. We remanded to that court "to make factual findings in consideration of whether privacy interests alone justify the redactions."

On April 20, 2001, the district court found as fact, first, that there was "absolutely no reason to believe that the accusations [in the Proffer Letters] are true"; second, the court had placed no weight on the Proffer Letters in reducing Nathanson's sen-

tence; third, the letters "contain no newsworthy information"; fourth, that, to the extent the high public official was accused of criminal conduct, the accusation was prejudicial to the official's reputation; fifth, that the allegations concerning campaign fund-raising would have "a serious adverse effect upon the official's public and private reputation" and that "given the widespread public suspicion of corruption," no amount of denial would "completely dispel suspicion"; sixth, that the private individual had an excellent reputation which was "a significant business asset" and that there was a substantial probability that, absent redaction, the ability of the individual and his company to complete current and anticipated business activities would be harmed; and finally, that "other innocent parties, including the private individual's partners and employees" would suffer harm directly attributable to the release of the unredacted letters. As a conclusion of law the court found its redactions to serve "the compelling interest of protecting both the privacy interests and the reputational interests" of the official, the private individual, and "other innocent persons."

The Bee again seeks the aid of this court.

ANALYSIS

[1] *The Bee* has framed its application to this court as an appeal or, in the alternative, as an application for a writ of mandamus. *The Bee* is not a party to *United States v. Nathanson*; hence, it lacks standing to appeal. *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978). We turn to whether the extraordinary remedy of mandamus is warranted. We are guided by the familiar factors set out in *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977).

[2] Because *The Bee* cannot appeal, the first factor is satisfied: *The Bee* has no other avenue of relief. The second factor, damage or prejudice to the petitioner, is equally satisfied: *The Bee* is denied access to court documents presumptively avail-

able to the press. *CBS, Inc. v. U.S. District Court for the Central District of California*, 765 F.2d 823, 826 (9th Cir. 1985).

[3] The third, and most important *Bauman* factor, is whether mandamus is required to rectify "clear error" by the district court. Such error is apparent. We remanded for a determination of "whether privacy interests alone" justify the redactions. The court's findings do not point to compelling privacy interests. The high public official has no privacy interest in freedom from accusations, baseless though they may be, that touch on his conduct in public office or in his campaign for public office. The private individual, who was found by the district court to do much business with public bodies, has no privacy interest in allegations, baseless though they may be, bearing on the way he does business with public bodies.

The right "to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files have become a vehicle for improper purposes." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1972). Courts have properly refused "to permit their files to serve as reservoirs of libelous statements for press consumption" or "as sources of business information that might harm a litigant's competitive standing." *Id.* at 598. But this case does not involve "the protection of minor victims of sex crimes from further trauma and embarrassment." *See Globe Newspaper v. Superior Court*, 457 U.S. 596, 607 (1982); nor is there present the governmental interest in protecting the privacy of jurors. *See Press Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 511 (1984); nor is there the governmental interest in preventing abuse of the civil discovery process. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35-36 (1984); nor is there the governmental interest in not tipping off suspects by disclosure of search warrants. *Times-Mirror Company v. United States*, 873 F.3d 1210, 1215-16 (9th Cir. 1989). These cases do show that the need to protect individual privacy

rights may, in some circumstances, rise to the level of a substantial governmental interest and defeat First Amendment right of access claims. No such interest has been established here. The Supreme Court has noted that the American view of the right to inspect and copy court documents is in contrast with English practice and embraces as an interest compelling disclosure "the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper publisher's intention to publish information concerning the operation of government." *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598.

[4] Although not within the precise terms of our remand, the district court was concerned with a separate interest of both the official and the individual, that of reputation. Who could or would deny that reputation is a valuable asset? Who would dispute the district court's observation that a charge of corruption against a public official is difficult to dispel by denial? But injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978). Silence enforced upon the press to protect the reputation of judges is more likely to "engender resentment, suspicion, and contempt much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 271 (1941). The same is true of public officials and of real estate developers engaged in projects requiring governmental approval.

A decent newspaper will not publish Nathanson's accusations without also publishing the skepticism of Nathanson's credibility shared by the district judge and the office of the United States Attorney. If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility.

[5] *The Bee* began this protracted lawsuit in 1999 in an effort to discover why Nathanson had obtained a significant reduction in his sentence. That was a subject of legitimate

public interest. The relevance vel non of the Proffer Letters to the reduction is something the press has a right to explore and to publish. No adequate justification for their redaction has been offered by the court or by the official and the individual affected, counsel for whom have argued this case on this appeal.

[6] The error in suppressing by redaction is clear, and the fifth *Bauman* factor, the importance and newness of the issue, is also satisfied: the press must be free to monitor the courts by access to their records; the application of this principle to the Proffer Letters is new.

[7] As four of the five *Bauman* factors indicate, we grant the writ of mandamus. The order of the district court is VACATED. The case is REMANDED to the district court with instructions to unseal the Proffer Letters and make them publicly available.

VACATED AND REMANDED.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: MCCLATCHY NEWSPAPERS, INC.,
dba The Sacramento Bee.

MCCLATCHY NEWSPAPERS, INC.,
dba The Sacramento Bee,
Petitioner,

v.

No. 01-70941
D.C. No.
CR-92-00215 LKK

U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA.,
Respondent,

MARK LESLIE NATHANSON, UNITED
STATES OF AMERICA; AN UNNAMED
PUBLIC. OFFICIAL; AN UNIDENTIFIED
PRIVATE CITIZEN,
Real Parties in Interest.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 01-10335
D.C. No.
CR-92-00215-LKK

MCCLATCHY NEWSPAPERS, INC.,
dba The Sacramento Bee,
Defendant-Appellee,

v.

OPINION

MARK LESLIE NATHANSON,
Appellant.

Petition for a Writ of Mandamus

Argued and Submitted
November 13, 2001--San Francisco, California

Filed December 3, 2001

Before: Mary M. Schroeder, Chief Judge,
John T. Noonan, and William A. Fletcher, Circuit Judges.

Opinion by Judge Noonan

COUNSEL
Rex Heinke, Beverly Hills, California, for petitioner
McClatchy Newspapers, Inc.

James C. Harrison, Esq., San Leandro, California,
for the Unnamed Government Official.

Doe Counsel, for the Unidentified Private CITIZEN.

OPINION

NOONAN, Circuit Judge:

McClatchy Newspapers, Inc., dba *The Sacramento Bee* (*The Bee*), seeks a writ of mandamus to reverse the final postjudgment order of the district court in response to *The Bee*'s request that it unseal, without redaction, two proffer letters offered by Mark Leslie Nathanson (Nathanson) in connection with his motion to reduce his criminal sentence. We grant the writ, vacate the order, and remand to the district court to unseal the letters and make them publicly available without redaction.

FACTS AND PROCEEDINGS

On May 7, 1992, Nathanson was indicted on eight felony counts arising from federal offenses committed in his service from 1986 to 1992 as a member of the California Coastal Commission. On June 23, 1992, jury trial before Judge Lawrence K. Karlton was set for February 10, ~~1993,~~ a date that was postponed. On June 3, 1993, Nathanson entered into a plea agreement. On June 24, 1993, he pleaded guilty to conducting his position as a Coastal Commissioner "as a racketeering enterprise," seeking bribes from fourteen persons dealing with the Coastal Commission in amounts ranging from $25,000 to $250,000. He also pleaded guilty to filing a false tax return in 1991, concealing one of the bribes he had received. The bribes were paid by identified real estate developers and by persons owning homes on the coast. The $250,000 bribe was arranged with the help of Alan Robbins, a state senator later convicted of other federal crimes. On August 24, 1993, Nathanson was sentenced to imprisonment for 4 years and 9 months.

The plea agreement, paragraph 20, provided that if the government decided that Nathanson's cooperation warranted it, the government would, within one year of the imposition of sentence, move under Rule 35 of the Federal Rules of Criminal Procedure to reduce Nathanson's sentence. The government did not make such a motion, but one year to the day from his sentencing, Nathanson filed a motion to reduce his sentence, attaching to the motion two letters (the Proffer Letters) which he said pointed to information of value to the government. The first letter was from Nathanson's lawyer, Stephen L. Braga, to Assistant U.S. Attorney Geoffrey Goodman and was dated May 31, 1993, that is, shortly before Nathanson and the government agreed to his plea of guilty. The letter recounted a number of times in which a high political figure approached Nathanson to get Nathanson's assistance in obtaining campaign contributions from people who had received favorable action by the Coastal Commission. The second letter, dated August 11, 1994, was from Jerrold M. Ladar, another lawyer for Nathanson, to Assistant U.S. Attorney John K. Vincent. In this letter the same political figure was alleged by Nathanson to have sought favorable action from the Coastal Commission on behalf of friends and supporters. Nathanson also was reported to have agreed to a bribe, disguised as a consulting fee, to be paid by a developer seeking his support in action by the Coastal Commission.

No action was taken on Nathanson's motion to reduce sentence, a motion that did not quality as a Rule 35 motion because it was not made by the government. Nathanson's motion was not docketed, and it, together with the Proffer Letters, was placed in the clerk's safe, beyond public scrutiny.

Two years later, on August 27, 1996, Assistant U.S. Attorney John K. Vincent moved, pursuant to Fed. R Crim. P. 35, to reduce Nathanson's prison sentence from 4 years, 9 months to 3 years, 9 months. The motion stated it was made"in light of assistance he had provided to the government, as well as humanitarian concerns about his skin condition." This motion qualified, in part, as a Rule 35 motion because it was made by the government. It did not, however, specify assistance to the government in a criminal case, as required by Rule 35. No hearing was held. On September 29, 1996, Judge Karlton granted the motion.

On September 14, 1999, Nathanson's probation officer filed a petition to revoke his probation for failure to pay restitution. *The Bee* learned of this proceeding and, on October 14, 1999, requested access to three documents numbered 175, 176, and 177 which were not in the file or referred to in the docket. *The Bee* noted that neither the Rule 35 motion nor court's order contained information "about the basis for the substantial reduction" of Nathanson's sentence. On November 9, 1999, the court held a hearing on *The Bee*'s request. The government now moved formally to seal the documents sought by *The Bee*. The court sealed the documents. On December 7, 1999, the court released the Proffer Letters in redacted form. The district court's reasons for its redactions were "the safety of the defendant, his well-being. And also the reputation of other people that the government has concluded there is no evidence to suggest were guilty of crimes but were nevertheless accused of crimes."

The Bee sought a writ of mandamus to obtain the unredacted letters. On January 22, 2001, we granted the writ, observing that the government conceded that it was "unable to identify specific facts that Nathanson's safety would be in greater jeopardy," and noting that the district court had not identified

"any facts whatsoever" to support its redactions. We remanded to that court "to make factual findings in consideration of whether privacy interests alone justify the redactions."

On April 20, 2001, the district court found as fact, first, that there was "absolutely no reason to believe that the accusations [in the Proffer Letters] are true";second, the court had placed no weight on the Proffer Letters in reducing Nathanson's sentence; third, the letters "contain no newsworthy information"; fourth, that, to the extent the high public official was accused of criminal conduct, the accusation was prejudicial to the official's reputation; fifth, that the allegations concerning campaign fund-raising would have "a serious adverse effect upon the official's public and private reputation" and that "given the widespread public suspicion of corruption," no amount of denial would "completely dispel suspicion"; sixth, that the private individual had an excellent reputation which was "a significant business asset" and that there was a substantial probability that, absent redaction, the ability of the individual and his company to complete current and anticipated business activities would be harmed; and finally, that "other innocent parties, including the private individual's partners and employees" would suffer harm directly attributable to the release of the unredacted letters. As a conclusion of law the court found its redactions to serve "the compelling interest of protecting both the privacy interests and the reputational interests" of the official, the private individual, and "other innocent persons."

The Bee again seeks the aid of this court.

ANALYSIS

The Bee has framed its application to this court as an appeal or, in the alternative, as an application for a writ of mandamus. *The Bee* is not a party to *United States v. Nathanson*; hence, it lacks standing to appeal. *United States v. Sherman*, 581 F.2d 1358, 1360 (9th Cir. 1978). We turn to whether the extraordinary remedy of mandamus is warranted. We are guided by the familiar factors set out in *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Because *The Bee* cannot appeal, the first factor is satisfied: *The Bee* has no other avenue of relief. The second factor, damage or prejudice to the petitioner, is equally satisfied: *The Bee* is denied access to court documents presumptively available to the press. *CBS Inc. v. U.S. District Court for the Central District of California,* 765 F.2d 823, 826 (9th Cir. 1985).

The third, and most important *Bauman* factor, is whether mandamus is required to rectify "clear error" by the district court. Such error is apparent. We remanded for a determination of "whether privacy interests alone" justify the redactions. The court's findings do not point to compelling privacy interests. The high public official has no privacy interest in freedom from accusations, baseless though they may be, that touch on his conduct in public office or in his campaign for public office. The private individual, who was found by the district court to do much business with public bodies, has no privacy interest in allegations, baseless though they may be, bearing on the way he does business with public bodies.

Although not within the precise terms of our remand, the district court was concerned with a separate interest of both the official and the individual, that of reputation. Who could or would deny that reputation is a valuable asset? Who would

dispute the district court's observation that a charge of corruption against a public official is difficult to dispel by denial? But injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978). Silence enforced upon the press to protect the reputation of judges is more likely to "engender resentment . . .suspicion, and contempt much more than it would enhance respect." *Bridges v. California*, 314 U.S. 252, 271 (1941). The same is true of public officials and of real estate developers engaged in projects requiring governmental approval.

A decent newspaper will not publish Nathanson's accusations without also publishing the skepticism of Nathanson's credibility shared by the district judge and the office of the United States Attorney. If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility.

The Bee began this protracted lawsuit in 1999 in an effort to discover why Nathanson had obtained a significant reduction in his sentence. That was a subject of legitimate public interest. The relevance vel non of the Proffer Letters to the reduction is something the press has a right to explore and to publish. No adequate justification for their redaction has been offered by the court or by the official and the individual affected, counsel for whom have argued this case on this appeal.

The error in suppressing by redaction is clear, and the fifth *Bauman* factor, the importance and newness of the issue, is also satisfied: the press must be free to monitor the courts by access to their records; the application of this principle to the Proffer Letters is new.

As four of the five *Bauman* factors indicate, we grant the writ of mandamus. The order of the district court is VACATED. The case is REMANDED to the district court with instructions to unseal the Proffer Letters and make them publicly available.

VACATED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

NO. CR. S-92-215 LKK

Plaintiff,

v. ORDER

MARK L. NATHANSON,

Defendant.

_____/

In June of 1993, the defendant in the above-captioned matter entered pleas of guilty to one count of conducting affairs of an enterprise through a pattern of racketeering and one count of filing a false tax return. The plea agreement contemplated the government's moving to reduce the sentence within one year under 5k1 of the Federal Sentencing Guidelines if Nathanson's cooperation warranted such a motion. Thereafter the defendant was sentenced.

The government apparently refused to file a Rule 35 motion because it did not regard Nathanson's service as significant. In August, Nathanson filed his own motion. Attached to Nathanson's motions were the two proffer letters which gave rise to the instant proceedings. The first letter accused a high public official of improper conduct and the second letter further expanded upon that alleged wrongdoing and further accused a private citizen of offering bribes and filing false income tax returns.

Thereafter, pursuant to a motion of the government under Rule 35 premised on matters other than those contemplated by the plea agreement, the defendant's sentence was reduced.

When the defendant's probation officer filed a petition to revoke supervised release, the *Sacramento Bee* requested access to the proffer letters.[1] In response, the court released the proffer letters in redacted form. Upon the *Bee*'s appeal, the Ninth Circuit remanded the case to this court "to make specific findings" capable of appellate review concerning the reasons for the redaction.

Upon remand, the *Sacramento Bee* again moved for access to the redacted documents. The court provided an opportunity for the government official and private citizen to file responses, the *Bee* in turn responded thereto.[2]

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[1] Although the letters had been filed under seal the court had never issued a formal order sealing those documents. After a response from Nathanson's attorney and the government, the court formally sealed the documents.

[2] The private citizen has filed his responses under seal for fear that the filing itself would reveal who he was and thus moot the whole purpose of the hearing. The court offered the *Bee*'s attorney an opportunity to examine the documents under circumstances which would protect the private citizen's identity. The private citizen moved for reconsideration of that order and the court stayed it pending the *Bee*'s response. The *Bee* has responded indicating that it would not examine the document under the specified restrictions, thus mooting the issue.

After a brief hearing, the court took the matter under submission. Below, the court sets forth its findings of fact and conclusions of law.

I.
FINDINGS OF FACT

A. THE "NEWSWORTHY" CHARACTER OF THE PROFFER LETTERS

1. The proffer letters are hearsay accusations of improper or criminal conduct allegedly committed by both the government official and the private citizen. They are based upon the accusations of a felon and admitted perjurer.[3] They were made in support of a motion to reduce a sentence, which in this court's long experience as a judge presiding over federal criminal matters is a set of circumstances inviting false accusation. Unlike those proffers upon which the government has typically relied when it makes a 5kl motion, no attempt was made by the government to corroborate these accusations because the government concluded that Mr. Nathanson had lied in the course of the debriefing. Under the circumstances there is absolutely no reason to believe the accusations are true.

2. The *Bee* has asserted that the proffers are nonetheless potentially newsworthy because they could form the basis for investigation involving comparison of contributions lists required to be filed, with the accusations which Nathanson made. This assertion of newsworthiness is entitled to little, if any, weight. The proffer letters

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[3] Although the *Bee* asserts that the defendant did not plead guilty to perjury, it overlooks the fact that he plead guilty to filing a false tax return which was filed under penalty of perjury.

demonstrate that those accused had an ongoing relationship with each other, as did others that Nathanson suggested the government official had sought his help on. Thus, any comparison would only demonstrate persistent support and thus would not corroborate Nathanson's accusations.

3. The court placed no weight on the proffer letters in considering any of the substantive matters regarding the underlying charges or the sentence. Accordingly, the public interest in knowing why Mr. Nathanson's sentence was reduced and whether the government acted responsibly in doing so, will not be served by release of these documents.

4. In sum, the court concludes that the proffer letters contain no newsworthy information, and are in essence repositories of libelous accusations, scandal and gossip.[4]

B. FACTS CONCERNING THE HIGH GOVERNMENT OFFICIAL.

1. To the extent that Mr. Nathanson has accused the high government official of criminal conduct, the accusation is self-evidently prejudicial to the official's reputation.

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[4] The court notes that in the Nathanson filing in opposition to the *Bee*'s motion, the defendant suggested that he had an interest in his personal safety and economic well being, which he believed would be compromised by release of these documents. The Ninth Circuit gave no credence to those accusations, relying instead on the government's representation that it had no reason to believe that Nathanson's personal safety was endangered. The government did not respond to Nathanson's assertion that he feared economic retribution. The Ninth Circuit's handling of the Nathanson filing suggests that the kinds of assertions made in letters of this sort should be given no weight vel non, thus supporting the court's conclusion that the proffer letters are not newsworthy.

2. This court has previously received evidence which demonstrates "a wide-spread sense of voting Californians that there is at least an appearance of corruption ..." in all branches of California government. *See California Prolife Council v. Scully*, 989 F. Supp. 1282, 1295 (E.D. Cal. 1998).

3. To the extent that the proffer letters contain allegations concerning fund-raising, there is a substantial probability they will have a serious adverse effect upon the official's public and private reputation. Given the widespread public suspicion of corruption, these unsubstantiated accusations will have a serious adverse effect on the official's reputation, and no amount of denial will completely dispel suspicion.

4. The redacted proffer letters represent the broadest possible provision of information consistent with maintaining the privacy and reputational interests of the high governmental official.

C. FACTS CONCERNING THE PRIVATE INDIVIDUAL

1. In the proffer letter, Nathanson accuses the private individual of unlawful conduct and relates that accusation specifically to the private individual's business. The private individual is a very successful businessman, whose business requires regular contact with government agencies at various levels, permits granted by such agencies, and other favorable governmental action.

2. The private individual and his company enjoy an excellent reputation in the relevant business and governmental communities.

3. The private individual's reputation and that of his company is a significant business asset, and his reputation for honesty and quality work has been a deciding factor in decisions by others which have permitted his company to proceed and engage in large and successful projects.

4. There is a substantial probability that public disclosure of the Nathanson allegations would impair the ability of the private individual and his company to complete current and anticipated business activities.

5. There is a substantial probability that in the absence of redaction, the private individual's reputational and privacy rights will be harmed.

6. There is a substantial probability that other innocent people, including the private individual's partners and employees, will suffer harm directly attributable to release of the unredacted letters.

7. Redaction of Nathanson's proffer letters has provided the *Bee* and the public with the broadest information which can be made available consistent with protection of the private individual's privacy and reputational interests.

II.
CONCLUSIONS OF LAW

The sealed material relates to defendant Nathanson's Rule 35 motion, and under binding law are presumptively open. *See CBS, Inc. v. United States District Court*, 765 F.2d 823 (9th Cir. 1985). As the *Bee*, itself, acknowledges, the right of access to judicial records is not absolute. As the Circuit noted in its previous review of this matter, "presumptively open court records can be closed only if: (1)

closing them serves a compelling interest; (2) there is a substantial probability that, in the absence of closing them, this compelling interest will be harmed; and (3) there are no alternatives to closing them that would adequately protect the compelling interest." *United States v. McClatchy Newspapers*, Mark Leslie Nathanson Real Party in Interest, slip op. at 3 (citing *Oregonian Publishing Co. v. U.S. District Court for the District of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990) (citing *Press Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 13-14 (1986))).[5]

Turning to the three standards mandated by *Oregonian Publishing Co.*, the court finds that retaining the redacted form of the proffer letters serves the compelling interest of protecting both the privacy interests and the reputational interests of both the government official and the private individual. *See Press Enterprises Co. v. Superior Court of Riverside County*, 464 U.S. 501, 512 (1984) ("[A] valid privacy right may rise to a level that part of the transcript should be sealed . . . .").

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[5] In this formulation, the court does not address whether the public documents contain material which is of significance to the public, and balance that factor against the harm which may be occasioned by opening those records. Yet in other cases dealing with the same issue, such questions are regarded as significant. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("[C]ourts have refused to permit their files to serve as reservoirs of libelous statements for press consumption.")

The court has made a finding of fact that there is no newsworthy information contained in the proffer letters. In the court's view, in light of that finding, the ordinary presumption of openness would not apply. Because no case specifically so holds, however, the court will not rely upon that conclusion in resolving the instant matter.

Even accepting the *Bee*'s suggestion that public officials suffer a diminished quantum of privacy and reputational interest, here the accusations are made by a convicted felon and admitted perjurer, they accuse the official of at least improper and perhaps illegal conduct and the public official has no way of addressing those accusations except by denial. Given the profound suspicion that the public entertains concerning elected officials, the official will suffer grave and unjustifiable damage.

Obviously the *Bee* cannot argue that the private individual in some way enjoys less than the full complement of privacy and reputational rights. The *Bee* seeks to undermine those interests by filing a number of newspaper articles concerning individuals that it speculates may be the person at bar. Without for a moment suggesting that they identified the appropriate person, the court does not find such filings helpful. There is no suggestion that any of those articles deal with the accusations in the proffer letter, and as best the court can determine, they do not. Moreover, those articles are sufficiently in the past so that it may be reasonable to suggest that any individual discussed there, even if he were once the subject of news reports, is no longer in the public eye.

Second, the court has found that in the absence of redaction, the compelling interest in privacy and reputation would be harmed

Third, the court notes that these redactions are narrowly tailored to ensure privacy without unduly restricting the public access to the Nathanson Rule 35 materials.

Finally, the court notes that in addition to the privacy interests of the two individuals it is clear that other innocent persons will be harmed as well. As the Third Circuit has said

"[i]n these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals." *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985)(cited with approval by the Ninth Circuit in *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989)).

For all the above reasons, the *Bee*'s motion for access to the two proffer letters is DENIED.[6]

IT IS SO ORDERED

DATED: April 19, 2001.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[6] The court notes that the *Bee* argues that there are other individuals named in the redacted letters whose interests are not endangered in the same manner as the government official and the private individual. While true, identification of those names will provide some significant evidence as to the name of the high government official and accordingly the motion to that portion of the proffer letters is DENIED. The *Bee* now has also requested access to the Nathanson opposition, which was filed under seal. In light of that motion, the court will file a redacted version of that communication.

APPENDIX D

D - 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 00-10161

Plaintiff-Appellee, D.C. No.
CR 92-00215-LKK

v.

MEMORANDUM[1]

McCLATCHY NEWSPAPERS, INC.,
dba *The Sacramento Bee*

Appellant

MARK LESLIE NATHANSON,

Defendant-Real party in Interest

_____/

Petition for Writ of Mandamus
from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted December 11, 2000
San Francisco, California

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R 36-3.

Before: SCHROEDER, Chief Judge, NOONAN, and W. FLETCHER, Circuit Judges.

Appellant McClatchy Newspapers, Inc., dba *The Sacramento Bee* ("*The Bee*"), a non-party in interest to the underlying criminal proceeding, seeks a writ of mandamus to reverse the final post-judgment order entered by the district court in response to *The Bee*'s request that the district court unseal three documents relating to a 1994 Fed. R. Crim. Proc. 35 motion that it had informally sealed. We grant the writ, vacate the order, and remand the case to the district court to make factual findings in consideration of whether privacy interests alone justify the redactions.

FACTS AND PROCEEDINGS

At a hearing on December 7, 1999, the district court ordered that one of the three documents be unsealed in its entirety and that the other two documents be unsealed after the names of certain individuals were redacted. These latter two documents are proffer letters that defendant Mark Nathanson submitted to the government demonstrating his alleged cooperation with and assistance to the government. Nathanson attached these letters to support his August 24, 1994 Rule 35 motion to reduce his sentence. At the December 7, 1999 hearing, the district court adopted the redactions proposed by the government and by Nathanson.

ANALYSIS

The Bee has a presumed constitutional right of access to the proffer letters that were filed with Nathanson's Rule 35 motion. In *CBS, Inc. v. U.S. District Court for the Central District of California* we recognized a constitutional right of access to "documents filed in support of motions for reduction

of sentence," holding that because "nothing in [Rule 35]'s language, history, or judicial interpretation" suggests a presumption of confidentiality, "the general presumption of openness will prevail." 765 F.2d 823, 826 (9th Cir. 1985). The government's attempt to characterize the proffer letters as atypical Rule 35 documents, likening them to confidential grand jury materials, is unpersuasive. Because the presumption of openness attached to the proffer letters when Nathanson filed them in support of his Rule 35 motion, the district court's order unsealing redacted versions of the proffer letters must survive a strict scrutiny.

In reviewing an order denying access to presumptively open court documents, we require the satisfaction of "both the procedural and the substantive requirements of the first amendment." *Oregonian Publishing Co. v U.S. District Court for the District of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990). Presumptively open court records can be closed only if: (1) closing them serves a compelling interest; (2) there is a substantial probability that, in the absence of closing them, this compelling interest would be harmed; and (3) there are no alternatives to closing them that would adequately protect the compelling interest. *Oregonian Publishing*, 920 F.2d at 1466 (citing *Press-Enterprise Co. v. Superior Court of California for the County of Riverside*, 478 U.S. 1, 13-14 (1986)). "The court may not base its decision on conclusory assertions alone, but must make specific factual findings." *Id.* (citing *Press-Enterprise*, 478 U.S. at 13-15).

Here, the district court's findings, stated in their entirety, were:

> The interest to be preserved, among other things, are the safety of the defendant, his well-being. And also the reputation of other

> people that the government has concluded there is no evidence to suggest were guilty of crimes but were nevertheless accused of crimes. Both of those, it appears to me, to be sufficient to justify the redaction.

The district court's reliance on the first interest was in error since the government concedes that it is unable to identify specific facts indicating that Nathanson's safety would be in greater jeopardy should each of the proffer letters be unsealed in its entirety. Nor did the district court identify any facts. Indeed, the district court did not identify any facts whatsoever to support its redactions under either allegedly compelling interest. Thus, whether the reputational interest cited by the district court is a compelling interest that overcomes the presumed right of access and justifies the redactions is a question that we cannot answer because the district court failed to "make specific factual findings" capable of appellate review. *Id.*

Mandamus is an "extraordinary remedy" that should be invoked only in "exceptional circumstances. " *See id.* at 1464. The guidelines for determining whether mandamus relief is appropriate are:

> (1) whether the petitioner has no other adequate means, such as direct appeal, to obtain the requested relief;
>
> (2) whether the damage or prejudice to the petitioner is such that it will not be correctable on appeal;
>
> (3) whether the district court's order is clearly erroneous as a matter of law;

(4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and

(5) whether the district court's order raises new and important problems or issues of first impression.

Bauman v. U.S. District Court, 557 F.2d 650, 654-55 (9th Cir. 1977). "[R]arely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators." *Id.* at 655. However, although all five factors need not be satisfied in order for mandamus to issue, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive." *Calderon v U.S. District Court for the Northern District of California*, 134 F.3d 981, 983-84 (9th Cir. 1998).

Here, because *The Bee* as a non-party-in-interest intervenor lacks standing to appeal the district court's order, the first and second factors are satisfied. The third factor is also satisfied. The district court erred as a matter of law by failing to apply the evidentiary requirements of *Press-Enterprise*, 478 U.S. 1 (1986).

We grant *The Bee*'s petition for a writ of mandamus and remand the case for the district court to consider whether the privacy interest of third parties, by itself, justified the redactions.

The order of the district court is VACATED and the case is REMANDED for proceedings consistent with this memorandum.